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COURT OF CRIMINAL APPEALS
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IN THE

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COURT OF CRIMINAL APPEALS

OF TEXAS
AUSTIN, TEXAS

MICHAEL JOSEPH BIEN
APPELLANT,

VS.

THE STATE OF TEXAS,
APPELLEE

APPELLANT'S BRIEF ON THE MERITS

NO. 11-14-00057-CR
NO. 11-14-00058-CR
COURT OF APPEALS FOR THE
ELEVENTH DISTRICT OF TEXAS AT EASTLAND

On appeal from Cause Numbers CR22319 & CR22320
in the 35th District Court of Brown County, Texas
Honorable Stephen Ellis, Presiding

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IDENTITIES OF PARTIES AND COUNSEL

Pursuant to the provisions of Tex. R. App. Proc. 38.1(a), a complete list of the names of all parties to this action and counsel are as follows:

Parties:

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Michael Joseph Bien, Appellant in this case, by and through his attorneys of record, Keith S. Hampton and Cynthia L. Hampton, and, pursuant to the provisions of Tex. R. App. Proc. 38, *et seq*., files this brief.

STATEMENT OF THE CASE

Appellant was charged in one indictment with attempted capital murder and solicitation to commit capital murder in another indictment. On February 21, 2014, after a jury trial, he was convicted of both offenses and assessed two life sentences to run concurrently.

On February 26, 2014, Appellant filed a *Notice of Appeal* and a *Motion for New Trial and in Arrest of Judgment*. (CR, p. 186). The trial court overruled the *Motion for New Trial and in Arrest of Judgment* on February 27, 2014. (CR, p. 13). This brief was due on October 14, 2014. However, this Court extended the time, on Appellant's *Motion for Extension of Time to File Brief*, to October 31, 2016, and it is timely filed.

ISSUES PRESENTED

<u>GROUND FOR REVIEW ONE</u>: THE COURT OF APPEALS ERRED WHEN IT HELD THAT PAROLE ELIGIBILITY MAY DETERMINE THE "MOST SERIOUS" OFFENSE FOR PURPOSES OF DOUBLE JEOPARDY.

<u>GROUND FOR REVIEW TWO</u>: WHAT IS THE PROPER REMEDY FOR MULTIPLE PUNISHMENTS WHEN THE "MOST SERIOUS" OFFENSE CANNOT BE DETERMINED?

SUMMARY OF PERTINENT FACTS

The Texas Rangers enlisted Mickey Westerman to act as their undercover agent to assist Appellant, who had expressed an interest in hiring a hit man, to kill Appellant's former brother-in-law, Koh Box. Westerman, in cooperation with law enforcement, arranged for an undercover officer to meet with Appellant and act as a hit man. Appellant was arrested after paying this agent $1000 to kill Box.

SUMMARY OF ARGUMENT

Parole eligibility considerations have no place in double jeopardy analysis. It cannot be equated to the severity of a punishment. Its use as a "tie-breaker" for multiple punishments which are the same is an exercise in speculation. The Court of Appeals clearly erred to employ it in determining which judgment to vacate.

If this Court intends to continue to use the "most serious offense" test created in *Landers v. State*, 957 S.W.3d 558 (Tex.Crim.App. 1997), the only genuine remedy where the "most serious offense" cannot be determined is to vacate and remand both judgments to the trial court for resolution. Anything less provides no remedy at all.

The *Landers* test has led courts in quest of a reliable definition of "seriousness," a mission that has failed to do anything more than beckon double jeopardy analysis deeper and deeper into the swamps of good-time credits and parole eligibility. This case presents an opportunity for this Court to shift course toward a simpler, more familiar and more grounded standard.

This Court should adopt a new construct which protects against multiple punishments for the same offense and provides a meaningful remedy when the State violates the double jeopardy protections enshrined in both state and federal constitutions. U.S. Const. Amend. V & XIV; Tex. Const. art. I §14, Courts – most especially trial courts – should be instructed to vacate the judgment rendered second in time because it is the second judgment, after all, which offends the prohibition against double jeopardy. Finally, this remedy should only apply when pursuit of multiple convictions was proper; otherwise, appellate courts should reverse both convictions as a way of respecting the double jeopardy prohibition and deterring its violation.

ARGUMENT AND AUTHORITIES

GROUND FOR REVIEW ONE: THE COURT OF APPEALS ERRED WHEN IT HELD THAT PAROLE ELIGIBILITY MAY DETERMINE THE "MOST SERIOUS" OFFENSE FOR PURPOSES OF DOUBLE JEOPARDY.

GROUND FOR REVIEW TWO: WHAT IS THE PROPER REMEDY FOR MULTIPLE PUNISHMENTS WHEN THE "MOST SERIOUS" OFFENSE CANNOT BE DETERMINED?

The Court of Appeals plainly erred by considering parole eligibility as a factor to determine which offense is the most serious one under the construct in *Landers v. State*, 957 S.W.3d 558 (Tex.Crim.App. 1997). This Court previously removed parole eligibility as a factor in determining the more serious offense in *Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex.Crim.App. 2006). This Court later recognized this holding in *Bigon v. State*, 252 S.W.3d 360, 373 (Tex.Crim.App. 2008)(Court overruled *Landers* "to the extent that factors such as ... parole eligibility rules should be considered when determining the most serious offense"). When the Court of Appeals declared that it "must examine the rules governing parole eligibility and the good-conduct time," relying on *Bigon, supra*, it was clearly wrong. *Bien v. State*, ___ S.W.3d___ (Tex.App. Nos. 11-14-00057-CR & 11-14-00058-CR – Eastland, delivered March 3, 2016), slip op. at 11.

Parole eligibility should not be a determinate in deciding whether one offense is more "serious" than another. It is an unreliable test for how long a person is

actually incarcerated. While two people serving 30-year aggravated sentences become parole eligible in 15 years, one can be promptly paroled while the other is never paroled. This inquiry therefore subjects the Double Jeopardy guarantees to the uncertainties of parole decisions. This Court was therefore wise to avoid "entering the thicket of parole eligibility and awards of good time." 41 George E. Dix & John M. Schmolesky, *Criminal Practice & Procedure* §19:16 (3rd ed. 2013).

This uncertainty is why the Legislature requires juries to be extensively and emphatically admonished:

> Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, the defendant will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time the defendant may earn. If the defendant is sentenced to a term of less than four years, the defendant must serve at least two years before the defendant is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.

> It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
>
> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Tex. Code Crim. Pro. art. 37.07, Section 4. It would be anomalous for judges to indulge in the very considerations deemed speculative by the Legislature and forbidden to juries.

The appellate court made no mention of Presiding Judge Keller's concurring opinion in *Cavazos*. However, it is the only opinion which champions the use of parole eligibility and good-time credits to determine which of two offenses are more serious. *Cavazos*, 203 S.W.3d at 338-341 (Keller, P.J. concurring). Specifically, Presiding Judge Keller challenged the Court's categorical rejection of the use of parole eligibility and good time awards:

> What will the Court do (or recommend that trial courts and lower appellate courts do) if the sentences are identical, the fine and restitution imposed are identical, and the only distinction involves parole consequences, e.g. when one of the offenses is covered by Article 42.12, §3g while the other is not? Do we look instead to the order in which the jury's verdict forms are submitted, the order in which the offenses appear in the penal code, or the cause numbers? Perhaps parole and good time consequences should not be the first tie-breaker, but it should

be an available tie-breaker when the punishment is otherwise identical.

Cavazos, 203 S.W.3d at 340-341 (Keller, P.J. concurring).

These questions and list of additional and ever-more strenuous inquiries demonstrate the limitations of reliably determining the most serious offense. The use of parole and good time awards is no less a fool's errand than the employment of these additional considerations. This Court should straightforwardly acknowledge the reality that the most serious offense cannot always be confidently determined.

Under the concurring opinion's hypothetical case, the injection of parole may provide a solution only under perfect conditions. This imaginary case presents identical twin sentences, the same in every way but one: parole eligibility. While an apparent conundrum in the abstract, counsel has a difficult time imagining a factual scenario featuring these twins in any case but the one presented to this Court. Nevertheless, the rare circumstance in this case highlights why an aggravated sentence does not invariably constitute a more serious sentence than a non-aggravated one.

Mr. Bien is eligible for parole after he has served one-half his sentence for one offense. He is eligible for parole much sooner for his other offense. However, the Board of Pardons and Paroles may deny parole on the non-aggravated offense even after Mr. Bien is awarded release on his aggravated offense. In such an event, Mr.

Bien would have a very different opinion about which of his twins he would sacrifice. "Seriousness," then, remains tethered to the uncertainty of future executive decision-making. Double jeopardy analysis should not be grounded in conjecture or unpredictability.

The idea that a 3g designation could be a reliable "tie-breaker" is unrealistic, so far as actual cases are concerned. It is the perfect solution to a perfect abstraction, and no more than that. Trial and appellate courts deserve more than an opinion deciding the number of twin sentences that might exist on the head of a constitutional prohibition. A descent into judicial speculation does nothing to advance the interests of clarity or reliability.

Parole eligibility also has nothing to do with the jury's punishment determination as a matter of law. Tex. Code Crim. Pro. art. 37.07, Sec. 4. In its pursuit of "the most serious offense," the concurring opinion would have the Court drift ever further from the shoreline of the most straightforward, workable and dependable test, i.e., a determination of the greatest sentence. This standard of review would satisfy the vast majority of double jeopardy violations – except, of course, the rare exception presented in this case.

Under *Landers'* cornered constraints, the only available solution in this case is to reverse both convictions. A reversal permits another trial by a prosecutor who

is encouraged to avoid violating the constitutional right against double jeopardy. The choice of the charging instrument under which to proceed is left to his discretion. Most importantly, the double jeopardy protection is vindicated. The interests of both the State and the defendant are thereby enlivened.

But this Court should also reevaluate the *Landers*' approach to double jeopardy violations and recognize that it is a failed experiment. The *Landers*' rule does nothing to deter the State from committing double jeopardy violations; on the contrary, the prosecution has nothing to lose but the conviction of least importance to it. Consequently, the problem of unconstitutional multiple punishments has persisted, if not proliferated.

Landers has rendered the constitutional guarantee against multiple punishments for the same offense meaningless. Instead of deterring double jeopardy violations, the rule encourages them. Instead of vacating the least serious offense, *Landers* should have required the vacation of the most serious one. Prosecutors are fully capable of knowing when they are seeking multiple punishments for the same offense. The vacation of the greater sentence would be the price to be paid for violating this constitutional right.

Landers transplanted the rule of misjoinder invented in *Ex parte Pena*, 820 S.W.2d 806 (Tex.Crim.App. 1991). Judge Campbell's concurring and dissenting

opinion in that case has proven prophetic. He predicted that "oftentimes, there will be no reliable method for determining which offense is most 'serious,'" and questioned the assumption that the prosecution would invariably elect to proceed on the offense with the greatest punishment (he estimated prosecutors would prefer the charge with the best proof). *Ex parte Pena*, 820 S.W.2d at 810. Joined by Judges Clinton and Benavides, Judge Campbell observed:

> A more basic flaw in the "most serious offense" rule is that there is no reliable way to determine in every case which offense is truly "most serious." Basing a decision on the sentence imposed is questionable because there is no way to really know why a particular sentence was imposed. Also, the "seriousness" of an offense would seem to depend largely on the facts of its commission, but, because of the rules of evidence, the punishment-assessor – and this Court – may very well be unaware of some of those facts.

Id.

Judge Campbell's solution was to uphold the conviction listed first in the judgment "because the first conviction listed in the judgment is the only one authorized by law." In cases with multiple judgments, he would uphold the conviction for the first offense in the indictment. Only in cases with multiple indictments and multiple judgments, "then, out of absolute necessity, we could resort to the sort of rule" requiring a determination of the most serious offense.

Landers fashioned its general rule under this crucial reasoning:

In the type of double jeopardy context before us ... the State is permitted

> to prosecute both offenses and submit both to the jury for consideration. ***Because pursuing both offenses is proper in this context, the State should have the benefit of the most serious punishment obtained.***

Landers, *supra* at 560 (emphasis added). Judge Campbell's approach would modify this rationale to read: When the pursuit of multiple offenses is proper, the State should have the benefit of the *first* punishment it obtained.

Judge Campbell was speaking to the jurisprudence of misjoinder, not double jeopardy. Whatever its use in misjoinder cases, his approach is the best way that fulfills all the values at play in the judiciary's enforcement of the double jeopardy prohibitions. In the most forthright way, it prevents double jeopardy violations, sparing appellate courts from fruitless review. The only judgment under these circumstances to be entered would be the one the trial court charged the jury. If such review fails, the reviewing court can look to the judgements. Under this approach, the difficulty presented in the instant case may appear again even more rarely before any appellate court because it would be confidently and permanently decided by trial courts.

Finally, this Court should make it clear that this test would apply only when pursuit of multiple offenses is proper, i.e., is not a plain violation of double jeopardy. In order to deter double jeopardy violations, this Court should require the vacation of *all* convictions where the prosecution *knowingly* sought multiple convictions for

the same offense.

At 3:30 p.m. on February 21, 2014, the jury foreman signed paragraph 7 of the jury instructions for attempted capital murder, finding Appellant guilty of attempted capital murder. (CR 22320, p. 178). On the same date and time, the jury foreman also signed paragraph 7 of the jury instructions for solicitation to commit capital murder, finding Appellant guilty of solicitation to capital murder. (CR 22319, p. 180). The trial court pronounced the sentence for attempted capital murder first. The trial court then pronounced the sentence for solicitation to commit capital murder. (RR, pp. 186-192). The judgments were entered on the same date and time. (CR 22319, p. 194); (CR 22330, p. 199).

Under a previously-rejected approach discussed *supra*, the second judgment would be struck. Under *Landers*, the least serious offense would be struck. Solicitation of, and attempted, capital murder cannot be separated from its statutory equation under chapter 15. This Court is left with speculations of executive branch decisions to determine which offense is worse, which the Court should constrain itself. Under this case, there is no reliable basis to decide which offense is the most serious. Consequently, this Court should reverse both convictions.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays this Court reverse the appellate court's judgment and remand the case to the trial court for dismissal of the indictments.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE: By affixing my signature above I hereby certify that this document contains a word count of 3235 and therefore complies with Tex.R.App.Proc. 9.4(i)(3).

CERTIFICATE OF SERVICE: By affixing my signature above, I hereby certify that a true and correct copy of the foregoing *Appellant's Brief on the Merits*, was delivered electronically (via Efile and Serve) to Elisha Bird, Brown County Assistant District Attorney, at the following email address, elisha.bird@browncountytx.org, on October 31, 2016.